

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LENZIE ELMER CHAFFIN, JR.,

Defendant-Appellant.

UNPUBLISHED

March 21, 2006

No. 258822

Oakland Circuit Court

LC No. 04-197691-FH

Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for domestic violence, third offense, MCL 750.81(4). We affirm. This appeal is being decided without oral argument under MCR 7.214(E).

Defendant's conviction arises from an incident that occurred when he and the victim were living together as boyfriend and girlfriend. The victim testified that she and defendant had been drinking and, after several hours of arguing, noticed that her mouth was bleeding. The victim did not remember defendant hitting her, but thought he must have hit her because she did not remember falling down and causing the injury herself. The prosecutor refreshed the victim's memory with her preliminary examination testimony where she affirmatively testified that defendant had hit her. The police officer that responded to the scene testified that the victim had bloodstains on her shirt and a swollen and bloody lip. The victim appeared upset and stated that defendant hit her. The officer also testified that defendant told him that "he was really sorry, that he had gotten in an argument with his girlfriend . . . and that he did slap her."

Defendant argues that he received ineffective assistance of counsel when his attorney did not allow him to testify and did not attempt to impeach the victim's testimony with letters she sent him before trial. Whether defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the trial court's factual findings for clear error and review de novo its constitutional determination. *Id.* Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). To overcome this presumption, defendant must show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according

to prevailing professional norms, and that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. *Strickland*, *supra* at 687-688; *Pickens*, *supra* at 309, 312-313.

A defendant's right to testify is contained in the constitutional guarantee of due process. *People v Simmons*, 140 Mich App 681, 684; 364 NW2d 783 (1985). Although a defendant's right to testify is ultimately within his control, if a defendant decides not to testify or acquiesces in his attorney's decision that he not testify, the right is waived. *Id.* at 684-685. Further, the decision whether to call a witness is a matter of trial strategy, *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988), which we will not second-guess on appeal. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant further argues that he received ineffective assistance of counsel when his attorney did not attempt to impeach the victim with letters that she sent him before trial.¹ However, our review is limited to the record established in the trial court; a party may not expand the record on appeal. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). Because the letters were not introduced into evidence at trial and were not included in defendant's motion for a new trial, they are not part of the lower court record and we cannot consider them on appeal.

The record does not contain specific evidence of errors of representation that fell below an objective standard of reasonableness. Even had defense counsel erred, there is no reason to believe an error or combination of errors affected the outcome of the proceedings. Accordingly, defendant has also failed to support his alternative request for remand for a *Ginther*² hearing.³ Defendant has failed to establish the deficient performance and prejudice required to succeed on a claim of ineffective assistance of counsel.

We affirm.

/s/ Janet T. Neff
/s/ Henry William Saad
/s/ Richard A. Bandstra

¹ These letters allegedly indicate that the victim started the altercation, providing defendant with a defense of self-defense. However, defendant does not indicate if the letters revealed what the victim said or did to start the altercation.

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

³ Defendant did not submit a motion to remand under MCR 7.211(C)(1). For remand to be proper, defendant must submit a supporting "affidavit or offer of proof regarding the facts to be established at a hearing." MCR 7.211(C)(1)(a)(ii). Defendant has provided no such factual support regarding what would have been revealed by absent evidence or testimony. He merely speculates that the evidence may have aided him. Therefore, he has made no showing of what facts could possibly be revealed at an evidentiary hearing.